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11 BANK OF AMERICA, N.A.; RECONTRUST
12 COMPANY, N.A.

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA — SAN FRANCISCO DIVISION

15 RAHILA KHAN,

16 Plaintiff,

17 vs.

18 RECONTRUST COMPANY and BANK OF
19 AMERICA, N.A., and DOES 1 through 10,

20 Defendants.

Case No. CV-12-01107-LB

**REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF'S
SECOND AMENDED COMPLAINT
[FRCP 12(b)(6)]**

Date: March 5, 2015

Time: 11:00 a.m.

Crtrm.: C; 15th Floor

Judge: Hon. Laurel Beeler

Trial Date: August 10, 2015

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff RAHILA KHAN's ("Plaintiff") Second Amended Complaint ("SAC") does little to establish a viable claim upon which relief may be granted. The Opposition is similarly defective and appears to rely, in part, on allegations and facts extrinsic to the SAC. This is, of course, improper to oppose a motion to dismiss. However, even if the Court were to consider facts and allegations first seen in the opposition and absent from the SAC, Plaintiff nevertheless fails to plead a viable claim against defendants BANK OF AMERICA, N.A. and RECONTRUST COMPANY, N.A. ("Moving Defendants"). Moving Defendants, however, have only addressed the arguments in the SAC on file with the Court by their motion.

In her opposition, rather than address the legal merits of the points and authorities advanced by Moving Defendants, Plaintiff appears to rely upon a narrative type account of alleged wrongdoing. Indeed, the legal arguments in the motion are entirely ignored. The question before this Court is whether the facts pleaded in the SAC rise to the level of fraud against Moving Defendants.

As discussed below, Plaintiff fails to address the legal merits of her sole surviving claim for fraud and the motion to dismiss is properly granted with prejudice.

II. LEGAL ARGUMENT

Because the SAC fails to allege facts sufficient to support a claim, it should be dismissed in its entirety without leave to amend.

A. Plaintiff Has Failed To Plead Facts to Support a Claim for Fraud Under the Heightened Pleading Requirements of Rule 9(b) and the Opposition Fails to Cure

In the moving papers, Moving Defendants set forth the following deficiencies in Plaintiff's SAC, each of which are included in the SAC to support her fraud theory.

1. Plaintiff Lacks Standing to Enforce the Terms of the PSA

The SAC generally alleges that Bank of America lacked authority to modify her loan because the alleged beneficiary, the Morgan Stanley Trust, did not participate in the Bank of America Home Loan Retention Program. *See*, SAC ¶ 14E. To support this theory, Plaintiff cites

1 the applicable Pooling and Servicing Agreement (“PSA”) and BANA’s duty to “maximize interest
2 payments and profits” under the PSA. *Id.* In the opening brief, Moving Defendants argue that
3 Plaintiff lacks standing to enforce the terms of the PSA and cites relevant legal authority for this
4 proposition. Plaintiff’s opposition fails to address the argument.

5 Similarly, Moving Defendants address the apparent *Glaski* claim by arguing that the rule in
6 *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal.App.4th 497 (2013) is the better reasoned case.
7 As relevant here, the *Jenkins* Court held that a borrower lacked standing to base a claim for relief
8 on the securitization process or breach of the PSA. Here again, Plaintiff’s opposition entirely fails
9 to address the legal merits of her claim.

10 Third, Moving Defendants address Plaintiff’s theory that investor disallowance of
11 Plaintiff’s requested modification was somehow fraudulent. In addressing the issue, Moving
12 Defendants cite California’s Homeowners’ Bill of Rights, that came into effect after the
13 modification events complained of in the SAC, for the proposition that investor disallowances is a
14 justifiable reason for denying a modification.

15 (2) If the denial was based on investor disallowance, the specific reasons for the
16 investor disallowance. Cal. Civ. Code § 2923.6

17 While the HOBR was not in effect during the time Plaintiff alleges she was wronged in the
18 SAC, and BANA had no similar duties at that time, it does provide this Court with some guidance
19 as to how an investor denial is treated currently. In response, Plaintiff’s opposition fails to address
20 this argument.

21 **2. Plaintiff’s Foreclosure Related Allegations Are Moot**

22 Moving Defendants provide this court with judicially noticeable documents to illustrate
23 that the foreclosure related allegations are entirely moot. The judicially noticeable documents
24 show that the Notice of Default has been rescinded. RJN, Ex. A, G. Moving Defendants also
25 point out that, contrary to the allegations in the SAC, the judicially noticeable documents also
26 illustrate that a Substitution of Trustee was recorded. See, RJN, Ex. F, effectively contradicting
27 the allegations set forth in Paragraphs 20 and 21 of the SAC. While Plaintiff does not address this
28 issue head on in the opposition, she does appear to concede that she accepted a loan modification

1 that might explain why the foreclosure was not completed.

2 **3. Plaintiff Fails to Plead Facts to Support the Required Elements of a Fraud**
 3 **Claim Against Corporate Defendants**

4 Under Fed. R. Civ. P. 9(b), “[i]n alleging fraud ..., a party must state with particularity the
 5 circumstances constituting fraud” Rule 9(b) governs plaintiffs’ complaint even though it was
 6 filed in state court before the case was removed to this Court.¹ To satisfy Rule 9(b)’s standard, the
 7 complaint must allege “particular facts going to the circumstances of the fraud, including time,
 8 place, persons, statements made and an explanation of how or why such statements are false or
 9 misleading.”² In a fraud action against a corporation, the complaint must “allege the names of the
 10 persons who made the allegedly fraudulent representations, their authority to speak, to whom they
 11 spoke, what they said or wrote, and when it was said or written.”³

12 Plaintiff’s opposition does nothing, even with the insertion of extrinsic facts, to cure the
 13 particularity defect with the fraud claim as to Moving Defendants. In the moving papers,
 14 defendants cite to another district court case where the Court disallowed a fraud claim to move
 15 forward because the allegations were not pleaded with the requisite particularity to survive a
 16 pleadings challenge.

17 “The complaint fails to support with facts a misrepresentation and merely concludes that
 18 representations as her modification application are false. The complaint identifies no person
 19 making alleged misrepresentations with required specificity to hold defendants accountable. The
 20 complaint fails to substantiate the misrepresentation element.” *Khan v. CitiMortgage, Inc.*, 975
 21 F.Supp.2d 1127, 1141 (E.D. Cal. 2013).

22
 23 ¹ See, e.g., *Lopez v. GMAC Mortgage Corp.*, 2007 WL 3232448, at *4 (N.D. Cal. 2007);
 24 *Varney v. R.J. Reynolds Tobacco Co.*, 118 F.Supp.2d 63, 67-68 (D. Mass. 2000); see also Fed. R.
 Civ. P. 81(c) (“These rules apply to a civil action after it is removed from a state court.”).

25 ² *Morris v. BMW of N. Am., LLC*, 2007 WL 3342612, at *3 (N.D. Cal. 2007) (citing *In re*
 26 *Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547-48 n.7 (9th Cir. 1994) (en banc)); see also *Schreiber*
 27 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (noting that under
 Rule 9(b) “the pleader must state the time, place, and specific content of the false representations
 as well as the identities of the parties to the misrepresentation.”).

28 ³ *Saldate v. Wilshire Credit Corp.*, 2010 WL 624445 (E.D. Cal. 2010), quoting *Tarmann v.*
State Farm Mut. Auto. Ins. Co., 2 Cal.App.4th 153, 157 (1991).

1 Plaintiff's opposition fails to attempt to distinguish the instant case from the other *Khan*
 2 case that was rightly dismissed. As the *Khan* Court reasoned, "[a]llegations of delay and avoiding
 3 regulators' scrutiny fail to substantiate intent to defraud. The complaint lacks facts to satisfy
 4 F.R.Civ.P. 9(b) specificity as to intent." *Khan*, *supra*, 975 F.Supp.2d at 1141.) The logic
 5 employed in that case is entirely applicable here, especially since Plaintiff has made no real
 6 attempt to distinguish the two cases.

7 Because the remaining arguments were simply not addressed by the opposition, Moving
 8 Defendants are content to stand on the opening brief. Therein, Moving Defendants address the
 9 deficiencies of the fraud claim – element by element – to illustrate why Plaintiff's fraud claim is
 10 simply deficient as a matter of law. The opposition does little, if anything, to address the legal
 11 deficiencies discussed throughout the opening brief.

12 Based on the foregoing, and the arguments advanced in the Moving Papers, it is now clear
 13 that Plaintiff has failed to allege the elements of a fraud claim, with the requisite specificity, to
 14 survive a motion to dismiss challenge.

15 III. CONCLUSION

16 For the reasons mentioned above, Plaintiff has failed to plead her causes of action in a
 17 manner which demonstrates a plausible claim to relief. Accordingly, Moving Defendants
 18 respectfully request that the Court grant their motion to dismiss with prejudice and enter judgment
 19 in favor of Moving Defendants.

20 DATED: February 4, 2015

SEVERSON & WERSON
 A Professional Corporation

22 By: /s/ Brian S. Whittemore
 23 Brian S. Whittemore

24 Attorneys for Defendants
 25 BANK OF AMERICA, N.A.; RECONTRUST
 26 COMPANY, N.A.
 27
 28

PROOF OF SERVICE

Rahila Khan v. Recontrust Company, et al.

United States District Court Northern District Case No. CV-12-01107-LB

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is One Embarcadero Center, Suite 2600, San Francisco, CA 94111.

On February 4, 2015, I served true copies of the following document(s):

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT [FRCP 12(B)(6)]

on the interested parties in this action as follows:

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Chilaren L. Kada

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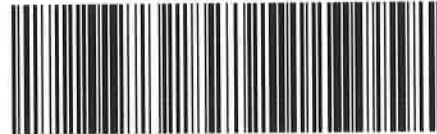
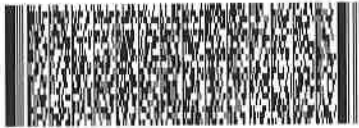
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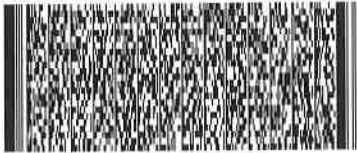
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